

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
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)	
Digital Broadcast Copy Protection)	MM Docket No. 02-230
)	

**Reply Comments of
Recording Industry Association of America**

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SUMMARY OF REPLY COMMENTS

The Recording Industry Association of America, Inc. (“RIAA”) believes that technology can play an important role in protecting against theft and piracy of copyrighted works. RIAA believes that the affected industries are best suited to develop through voluntary negotiated consensus the means of protecting against unauthorized copying and distribution of such works. Those directly involved in the selection and implementation of any copy protection system are in the best position to evaluate the technical options that will accommodate their differing needs and concerns. Moreover, privately negotiated solutions can adapt to changing technology and marketplace demands far better than government created mandates.

To that end, the Broadcast Protection Discussion Subgroup (“BPDG”) was formed as an industry-led initiative for the purpose of establishing a consensus standard to protect broadcast television from unauthorized redistribution in the digital environment. The BPDG issued a recommendation, with dissent, to ensure copy protection through the adoption of the Broadcast Flag. Should the Commission decide that the public interest requires regulations to implement the recommendation of the BPDG, the Commission should consider adopting regulations reflecting only the functional requirements of the BPDG recommendation rather than any specific technology. In any event, if the Commission acts to implement the BPDG recommendation or to adopt any other copy protection rules, RIAA urges the Commission to incorporate within those rules the following principles:

Protection of Sound Recordings. Any rules adopted by the Commission should protect the recording industry’s copyright interests in digital sound recordings aired on digital broadcasts, including specifically, audio associated with DTV video, audio on a DTV

station's excess capacity,¹ digital audio broadcasting and digital broadcast satellite. As noted in a number of the other comments filed in this proceeding, television programming often includes copyrighted sound recordings. In addition, under the Commission's DTV rules, licensees are permitted to use their excess digital capacity for audio-only programming and satellite providers offer programming in a digital format. Copy protection of these audio streams is a significant concern and should be covered equally under any rules adopted by the Commission. Finally, as the terrestrial radio industry begins the transition to digital, this proceeding necessarily implicates copy protection for digital audio broadcasting. Thus, any new FCC rule should be "content neutral" so as to apply to DTV Spectrum, digital audio broadcasting and digital satellite services. To do otherwise could effectively preclude developing copy protection rules for other digital media without causing receivers or other electronic devices to become obsolete.

Functional Specifications. If the Commission concludes that adoption of copy protection rules is appropriate, including any rules implementing the BPDG recommendations, RIAA believes that the Commission should consider adopting functional requirements instead of a specific technology. Such an approach would ensure that innovation and competition continue in the protection of digital programming, and that the protection is less vulnerable to permanent failure.

Encryption at the Source. If the Commission decides to adopt a rule other than one implementing the BPDG recommendation, the Commission should consider encryption at the

¹ These reply comments address, *inter alia*, copy protection issues related to any digital transmissions over a television licensee's 6 MHz of allocated DTV spectrum, including its use of excess spectrum capacity. For ease of reference, RIAA will refer to this 6 MHz as "DTV Spectrum," regardless of whether it is being used for digital television programming or for the transmission of other material in a digital format.

source as a possible alternative. Encryption may be an effective means of protecting copyrighted digital media and may enable the affected industries to enter into voluntary licensing agreements to implement a protection system.

Satisfaction of Consumer Expectations. The rules should not attempt to address the circumstances in which consumers and others may copy or distribute digital broadcast programming without authorization. RIAA believes that meeting the needs and expectations of the public is critically important to the viability of our industry. How companies satisfy consumer expectations is a business decision that should be driven by the dynamics of the marketplace, and should not be regulated. If the Commission adopts regulations in this proceeding, the regulations should be designed to enhance the ability of copyright owners to protect their works from unauthorized copying and distribution by precluding, to the extent feasible, the broadcast media from becoming a vehicle for undermining intellectual property rights laws.

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**Reply Comments of
RECORDING INDUSTRY ASSOCIATION OF AMERICA**

The Recording Industry Association of America, Inc. (“RIAA”), pursuant to Section 1.415 of the Commission’s Rules, hereby submits these reply comments in response to several of the comments filed with the Federal Communications Commission (the “Commission” or “FCC”) in the above-captioned proceeding.² In its *Notice of Proposed Rulemaking* (“*Notice*”), the Commission sought comment on whether the transition to digital television (“DTV”) would be enhanced if it adopted copy protection regulations to prevent the piracy of high quality digital broadcast television. Specifically, the Commission was concerned that producers of television programming would not create HDTV programming unless the risk of widespread distribution of that programming over the Internet or other media was minimized.

² *In re Digital Broadcast Copy Protection*, Notice of Proposed Rulemaking, 17 FCC Rcd. 16,027 (2002).

I. INTRODUCTION

RIAA is the trade association that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes its members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. They also license their recordings for use in audiovisual broadcast programming.

RIAA members have a strong interest in preventing unauthorized copying and distribution of copyrighted sound recordings. Unless such activities can be prevented, record companies will be unable to recoup the enormous financial investments they routinely make to bring new sound recordings to market and to develop the careers of new artists (a few of whom ultimately "make it," most of whom fail to achieve commercial success). If products and services that permit unauthorized copying and distribution of copyrighted sound recordings are allowed to proliferate, RIAA's members will increasingly find themselves competing in the marketplace against free, albeit illicit, goods and services, a business situation that cannot be sustained over time.

In these reply comments, RIAA highlights the relevance of copyrighted digital sound recordings to this proceeding. Audio material, including specifically sound recordings, is regularly aired as a component of all television programs. Under the ATSC system adopted for DTV service in the United States, the audio component of the television signal is digitized. In addition, since DTV licensees are permitted to use their excess digital capacity³ for a wide

³ The Commission allotted each broadcast licensee 6 MHz of spectrum for the transmission of digital television. However, any excess capacity on the 6 MHz of spectrum may be used for ancillary and supplementary services. Therefore, RIAA believes that this proceeding raises
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range of other services, including audio-only programming, the Commission should include that material within the scope of any rules adopted in this proceeding.

RIAA believes that technology can play an important role in providing safeguards against theft and piracy. These safeguards are best achieved through voluntary industry consensus rather than government-created mandates. To that end, the Broadcast Protection Discussion Subgroup (“BPDG”) was formed as an industry-led initiative for the purpose of establishing standards to protect broadcast television in the digital environment. BPDG issued a recommendation, with dissent, urging the adoption by the Commission of the Broadcast Flag in order to assure copy protection of copyrighted works.⁴ If the Commission concludes that the public interest will be served by adoption of the recommendations of the BPDG, it should consider doing so through adoption of functionality requirements rather than specific technology.

If the FCC determines that it is in the public interest to implement the recommendations of the BPDG, or to otherwise adopt a series of copy protection rules, RIAA urges that any rules adopted in this proceeding should not be limited to the DTV Spectrum but should apply to all digital broadcasting services, including all digital audio broadcasting and satellite services. RIAA also believes that if the Commission determines that the public interest would be served by adoption of a copy protection rule other than the BPDG

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copy protection issues for all copyrighted works transmitted on the 6 MHz of DTV spectrum, whether for DTV programming or digital transmissions on excess capacity. The term “DTV Spectrum” herein refers to any digital transmissions on the 6 MHz of DTV spectrum allocation.

⁴ See Final Report of the Co-Chairs of the Broadcast Protection Discussion Subgroup to the Copy Protection Technical Working Group (June 3, 2002).

recommendation, an industry-developed encryption at the source standard may be an effective alternative approach. Finally, consumer expectations with respect to the copying and redistribution of copyrighted material is a business issue that is best left to the marketplace.

II. PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN DIGITAL BROADCASTING IS ESSENTIAL TO THE CONTINUED AVAILABILITY OF NEW, CREATIVE MUSIC

The music industry has a significant interest in protecting the intellectual property rights of music stored, distributed, broadcast or transmitted in a digital format and preventing the unauthorized sharing or distribution of sound recordings over the Internet.

The Computer & Communications Industry Association would have the Commission disregard the music industry's experience with illegal copying of digital music as irrelevant to this proceeding.⁵ It argues that the Napster experience will not befall DTV programmers because the onerous process of downloading files and the poor sound quality of pirated recordings "puts a real limit on the number of people who would rather undertake this onerous task than buy the record."⁶ RIAA respectfully disagrees: the Napster case and recent experience with KaZaa – the most popular peer-to-peer system – demonstrate that millions of people are willing to accept lesser quality digital recordings and to invest the time required to download free pirated copyrighted works.⁷ CCIA has presented no rationale as to why people

⁵ See Comments of the Computer & Communications Industry Association ("CCIA") at 13-14.

⁶ Comments of CCIA at 13. CCIA further attempts to downplay the music industry's experience with Napster by citing the economic downturn and other business reasons as justification for the "recording industry's woes."

⁷ There is substantial evidence that large numbers of individuals are downloading copyrighted material, many using the KaZaa file-sharing software. According to KaZaa's website, its file-sharing software has been downloaded over 179 million times as of February 5, 2003, with over 2.9 million copies downloaded in the most recent week alone. The popularity of KaZaa is also illustrated by the November 2002 Nielson/NetRatings which show that KaZaa is the
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would not be willing to do the same to obtain pirated copies of DTV programming and digital audio broadcasts by DTV licensees.

Indeed, the music industry's economic losses from Internet piracy are directly relevant to this proceeding: the broadcast of sound recordings on DTV Spectrum, whether associated with television programs or broadcast as an audio-only service, can be pirated just as music distributed digitally in any medium. The threat of that piracy from the broadcast of music on the DTV Spectrum, as well as from other forms of digital transmission to the public, will have an inhibiting effect on the music industry's willingness and ability to commit the resources necessary to develop new artists and music. It also will stifle technological developments to improve sound quality beyond the current CD-quality recordings. The lack of a copy protection methodology covering digital broadcasting of sound recordings will adversely affect the availability of new sound recordings for digital broadcast programming.

III. THE COMMISSION SHOULD CONSIDER ADOPTING FUNCTIONALITY REQUIREMENTS INSTEAD OF A SPECIFIC TECHNOLOGY

RIAA believes that technology can play an important role in providing safeguards against theft and piracy of copyrighted works. The development of technical protection measures requires a thorough understanding of the affected content, device, hardware and software industries, and the music marketplace generally, which government necessarily lacks. In contrast, marketplace-negotiated protection measures developed through

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3rd most popular Internet application when ranked by time per person and the 6th most popular when ranked by the number of users. At any one time, there are between 2.5 - 3 million people simultaneously on KaZaa sharing over 700,000,000 digital media files, the vast majority of which are music files. Recent figures suggest that, when all peer-to-peer services are taken into account, approximately 2.6 billion files are illegally copied per month. In addition, over half of the broadband traffic in the U.S. reportedly consists of file-swapping.

negotiations among record companies, manufacturers and others directly affected by those measures can provide consensus solutions that benefit all affected parties and ultimately consumers.

Commission-created technical mandates lack these attributes. Those mandates are also far more difficult to modify in response to changing marketplace conditions and technical innovations. Consequently, RIAA does not believe that Commission-created mandates are the best way to serve the long-term interests of record companies, technology companies and consumers.

The BPDG was created as an industry-led initiative for the purpose of establishing standards to protect broadcast television in the digital environment. The BPDG issued a recommendation, with dissent, urging the Commission to ensure copy protection through the adoption of a Broadcast Flag. If the Commission determines that it is in the public interest to implement the recommendations of the BPDG, it should consider adopting functionality requirements instead of a specific technology. Such an approach would better ensure that innovation and competition continue in the protection of digital programming and that the protection system is less vulnerable to permanent failure.

IV. IF THE COMMISSION ADOPTS COPY PROTECTION RULES, IT MUST CONSIDER IN THIS PROCEEDING COPY PROTECTION CONCERNS RELATED TO SOUND RECORDINGS

In any event, if the Commission concludes that the public interest requires that it implement the recommendations of the BPDG or otherwise adopt general copy protection regulations, then RIAA believes it should include within the scope of those rules the protection of digital audio material as well. Unfortunately, the *Notice* proposes to limit the

proceeding to copy protection “within the limited sphere of digital broadcast television.”⁸

However, this issue and this proceeding cannot be viewed as though it is occurring in isolation. This proceeding directly implicates copy protection concerns for digital sound recordings as well as audiovisual works.⁹ RIAA submits that this proceeding is also relevant to copyrighted sound recordings that are transmitted on DTV Spectrum, whether or not associated with a DTV video program. In addition, any rules adopted in this proceeding should be designed to encompass digital audio broadcasting and digital audio transmissions by broadcast satellite operators, in order to avoid piecemeal regulation that may harm consumers by creating regulatory-imposed obsolescence of consumer products.

A. Copyrighted Sound Recordings on DTV Programming Must Be Covered Under Any Copy Protection Rules

It is insufficient to adopt copy protection rules that protect against impermissible piracy of the visual portion of digital television programming alone because copyrighted sound recordings regularly are broadcast as one component of DTV programming.¹⁰ DTV programming almost always contains copyrighted sound recordings, not only with music programs, but also with dramatic works, musicals, operas, ballets, similar theatrical performances based on entire musical scores, and movies.¹¹ Like other forms of music, the

⁸ Notice, ¶ 3.

⁹ See Comments of NMPA at 4-6; Comments of the Motion Picture Association of America, et al. at 4 (“MPAA Comments”).

¹⁰ It is not clear whether the copy protection system developed by the BPDG will protect copying of the audio portion of a television program. Footnote 41 of the Comments filed by the IT Coalition implies that the flag applies solely to the video portion. To the extent that is the case, the proposed flag is inadequate to achieve the goals RIAA believes the Commission is attempting to achieve.

¹¹ Also, in recent years, many television programs feature music by popular artists or rising stars. See www.thewb.com/Music/Index/0,7350,,00.html (providing a list of all music
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sound recordings of these songs are copyrighted, and illegal reproduction and distribution would violate those rights.

If the Commission adopts copy protection rules, they clearly must apply to digital sound recordings aired as components of DTV. The failure of the Commission to protect the audio portion of DTV programming could lead to a decline in the innovative use of music in television programming and the exposure of diverse music to the DTV viewing audience.

B. Audio Programming Aired on Broadcasters' Excess Digital Spectrum Should Be Included in Any Copy Protection Rule

In 1997, the Commission adopted rules governing DTV licensees' use of excess spectrum. The Commission noted that the DTV Standard:

allows the broadcast of at least one, and under some circumstances two, high definition television programs; and it allows "multicasting," the simultaneous transmission of three, four, five, or more digital programs. The Standard also allows for the broadcast of CD-quality audio signals. And it permits the rapid delivery of large amounts of data.¹²

Accordingly, the Commission determined that it would be in the public interest to permit DTV licensees to use their excess capacity for ancillary and supplementary services, including audio-only programming.¹³ Thus, DTV stations are permitted to, and likely will, use their excess digital spectrum to broadcast digital audio programming.

If the Commission adopts DTV copy protection regulations that do not protect copyrighted audio programming from piracy, the copyrighted sound recordings aired on DTV

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featured on the WB network programs, including information about the songs and artists and links to the artists' website); www.nbc.com/nbc/NBC_Featured_Music/ (same). In addition, music programs, similar in format to MTV and VH1, are aired on DTV broadcasts.

¹² See *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd. 12,809, ¶ 20 (1997).

¹³ See *id.* ¶ 29.

stations' excess capacity will be vulnerable to unlawful copying, manipulation and redistribution, including over the Internet. As the Napster and KaZaa cases demonstrate, the recording industry could face extensive economic losses as a consequence of such piracy. Therefore, any copy protection regulations adopted by the Commission should at a minimum encompass all audio programming, including audio-only programming, aired on DTV licensees' excess capacity to the same extent as the rules protect DTV programming.

C. The Commission Should Assure that Any Copy Protection Regulations Adopted in This Proceeding Apply to All Forms of Digital Transmissions to the End User

While this proceeding is focused on whether copy protection regulations should be adopted for distribution on DTV Spectrum, RIAA believes that the Commission should not consider that issue in isolation. The Commission has recently authorized digital radio operation, and, there is a rapid movement to use digital transmission as the sole means of making entertainment, news and other information available to the public. Domestic satellite radio providers operate in a digital mode. Furthermore, equipment technology is moving toward the "nerve center" model, which merges all forms of digital entertainment into one piece of equipment.¹⁴ Indeed, several companies already are making significant progress in the development of multimedia entertainment equipment. For example, Hewlett Packard is currently marketing the Media Center PC, a computer designed to meet all of a consumer's home entertainment and computing needs. The HP Media Center PC contains a computer, CD and DVD player, digital television, access to the Internet as well as the capability to

¹⁴ See Comments of NMPA at 5; Comments of Information Technology Association of America at 6-7.

receive digital satellite radio.¹⁵ Gateway likewise is developing products that combine digital audio and video equipment.¹⁶ Thus, any copy protection regulations adopted for DTV inevitably will impact the development of copy protection rules for other forms of digital media.¹⁷

Recognizing that there are questions as to the scope of the Commission's jurisdiction to adopt copy protection rules and that copy protection rules for transmissions not on DTV Spectrum may be beyond the scope of this rulemaking proceeding, RIAA believes that the Commission must act in this proceeding with a view to the future and with the other forms of digital transmissions in mind. In view of the similarity of the issues with digital radio, RIAA urges the Commission to make certain, to the extent feasible, that any copy protection rules adopted by the Commission in this proceeding are applicable to both the DTV Spectrum and to digital radio spectrum as well. Without assuring compatibility between the copy protection rules employed for DTV and digital radio transmission systems, the Commission will run the risk of either eviscerating copy protection for digital audio broadcasting because of the large number of legacy receivers and other devices in the marketplace, or making those receivers obsolete.

¹⁵ See www.hp.com. ("Enjoy the best in entertainment. Merge your PC, TV, DVD and CDRW all in the powerful new HP media center PC 883n. Pause live TV, instant replay or skip commercials. Create a slideshow of your family photos, add music and set it to play when you have friends over. Save your original videos, photos, music or data on DVD+RW/+R or CDRW discs.")

¹⁶ See "Electronics in Gateway Stores", *Newsday* (Oct. 15, 2002) ("The convergence of audio and video, television and PC is a lot sooner than we all probably realize."). See also Comments of Thomas, Inc. at 7 (describing development of "Personal Home Network").

¹⁷ See Comments of NMPA at 4-6.

V. ENCRYPTION AT THE SOURCE MAY BE AN EFFECTIVE ALTERNATIVE PROTECTION METHOD

If the Commission decides not to adopt the functional requirements of the BPDG proposal, but also concludes that copy protection rules are required, the Commission might consider the possibility of achieving copy protection through encryption of digital content at the source – *i.e.*, prior to transmission – to prevent exposure of any digital content in the clear.¹⁸ Encryption could serve as an effective technical protection alternative. An encryption standard could be developed through voluntary industry consensus and implemented through Commission regulation.¹⁹ Thus, to the extent the Commission adopts a protection rule, RIAA urges the Commission to consider voluntary industry implementation of encryption at the source as an alternative approach.

¹⁸ Whether transmission of encrypted programming would fall outside the classification of over-the-air “broadcasting” arguably may be unsettled but is ripe for clarification in this proceeding. In the *Subscription Video* proceeding, the Commission held that encryption of programming is one of several indicia of a broadcaster’s intent to offer non-broadcast services, because encryption limits access of the signal to the public. *See In re Subscription Video*, Report and Order, 2 FCC Rcd. 1001, ¶ 41 (1987). However, in a recent proceeding the Commission declined to rule on whether broadcasters could use encryption as a digital copy protection mechanism, leaving the issue open for resolution in a subsequent proceeding, such as this one. *In re Compatibility Between Cable Systems and Consumer Electronics Equipment*, Report and Order, 15 FCC Rcd. 17,568, ¶¶ 31-32. Even if the Commission views its *Subscription Video* order as precluding broadcasters from encrypting digital programs, the Commission also recognized in that order that it has the “clear authority” to revisit classifications of broadcast services, and to adopt a different position if appropriate. *Subscription Video R & O*, ¶¶ 21-22. The issues raised in this proceeding present such an opportunity. Because the DTV transition will necessitate that all consumers purchase new electronics equipment, it would be possible for the Commission to require incorporation of decryption technology, developed through industry consensus, into all receivers capable of receiving and copying or retransmitting a digital broadcast signal. In doing so, encrypted programming would meet the definition of “broadcasting”, *i.e.*, that the programming is intended to reach the public.

¹⁹ As detailed by the IT Coalition, encryption of DVDs was achieved successfully through voluntary license agreements between the movie industry and consumer electronics manufacturers. Under such agreements, a manufacturer agrees to build products designed to protect digital content and, in exchange, obtains “keys” to decrypt content on protected DVDs, which are built into products to comply with the licensing agreement. *See Comments of IT Coalition at n. 46; see also Comments of Motorola at 8-9.*

VI. AFFECTED INDUSTRIES, NOT THE COMMISSION, SHOULD BE RESPONSIBLE FOR SATISFYING CONSUMER EXPECTATIONS

Several of those commenting oppose copy protection mechanisms on the ground that such technologies will impinge on consumers' ability to copy broadcast material and to distribute it to friends and family or make other noncommercial uses of the work.²⁰ Despite RIAA's strong interest in preventing unauthorized copying and distribution of copyrighted sound recordings, RIAA does not believe that the Commission should, or needs to, define under what circumstances individuals can copy and distribute broadcast copyrighted material. Meeting the needs and expectations of the public is critically important to the viability of the recording industry. Consumers are eager to enjoy new music and new technologies and record and technology companies are already addressing those needs. But, how companies satisfy consumer expectations is a business decision that should be driven by the dynamics of the marketplace, and should not be regulated by the Commission.

²⁰ See, e.g., Comments of the Consumer Federation of America, et al. at 5-6; Comments of the Electronic Frontier Foundation at 13-15; Comments of the Consumer Electronics Association at 2-3; Comments of the Home Recording Rights Coalition at 1-4. Contrary to the position urged by the Consumer Federation of America et al., there is no absolute right for individuals to copy and distribute copyrighted works of others. There may be some circumstances in which the copying and distribution of a copyrighted work does not violate the intellectual property rights granted under the Copyright Act to the copyright holder, but there is nothing in the Copyright Act or in the Constitution or any other source of law that gives individuals an enforceable "right" to duplicate and distribute copyrighted works, nor, conversely, is there any obligation on copyright owners to distribute their works in formats that are convenient for those who would like to make unauthorized copies of them. See, e.g., William F. Patry, 1 Copyright Law & Practice 525, 725 (1994) (noting that "where an unauthorized use of a copyrighted work does fall within one of [the] rights [enumerated in Sections 106 and 106A of the Copyright Act], infringement occurs, unless excused by one of the privileges, exemptions, or compulsory licenses found in sections 107 through 120" and further recognizing that fair use "is a privilege, not a right").

VII. CONCLUSION

RIAA recognizes the need for and benefit of technical measures to protect copyrighted works against piracy. But the best way to achieve consensus on those measures is by voluntary marketplace negotiations. If, however, the Commission decides to adopt copy protection regulations in this proceeding, RIAA respectfully requests that it consider the following principles:

- Any copy protection scheme adopted for DTV should protect the associated audio stream.
- Any copy protection rules adopted should apply to audio streams, including audio-only programming, aired on a DTV licensee's excess capacity.
- If the Commission adopts any rules, it should adopt one set of rules that are broadly crafted to encompass both DTV as well as other digital audio broadcasts and transmissions to the end user.
- Commission regulations should define the functional requirements intended to be achieved and not adopt a specific technology.
- Encryption at the source should be considered as an effective alternative.
- Addressing consumer expectations about personal use of copyrighted broadcast works should be driven by the dynamics of the marketplace and is beyond the scope of this proceeding.

Respectfully Submitted,

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